

(2)
No. 90-288

Supreme Court, U.S.
FILED

SEP 17 1990

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

NEW YORK STATE TEAMSTERS JOINT COUNCIL 18
and VICTOR C. OLIVADOTI,

Petitioners,

v.

NEW YORK STATE TEAMSTERS COUNCIL HEALTH AND
HOSPITAL FUND, THE TRUSTEES OF THE NEW YORK
STATE TEAMSTERS COUNCIL HEALTH AND HOSPITAL
FUND, JAMES M. CARLTON, EVERETT L. CAMPBELL,
JAMES A. HOOD, JOHN PRYSHLAK, NICHOLAS ROBI-
LOTTO, AND ERVIN WALKER,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

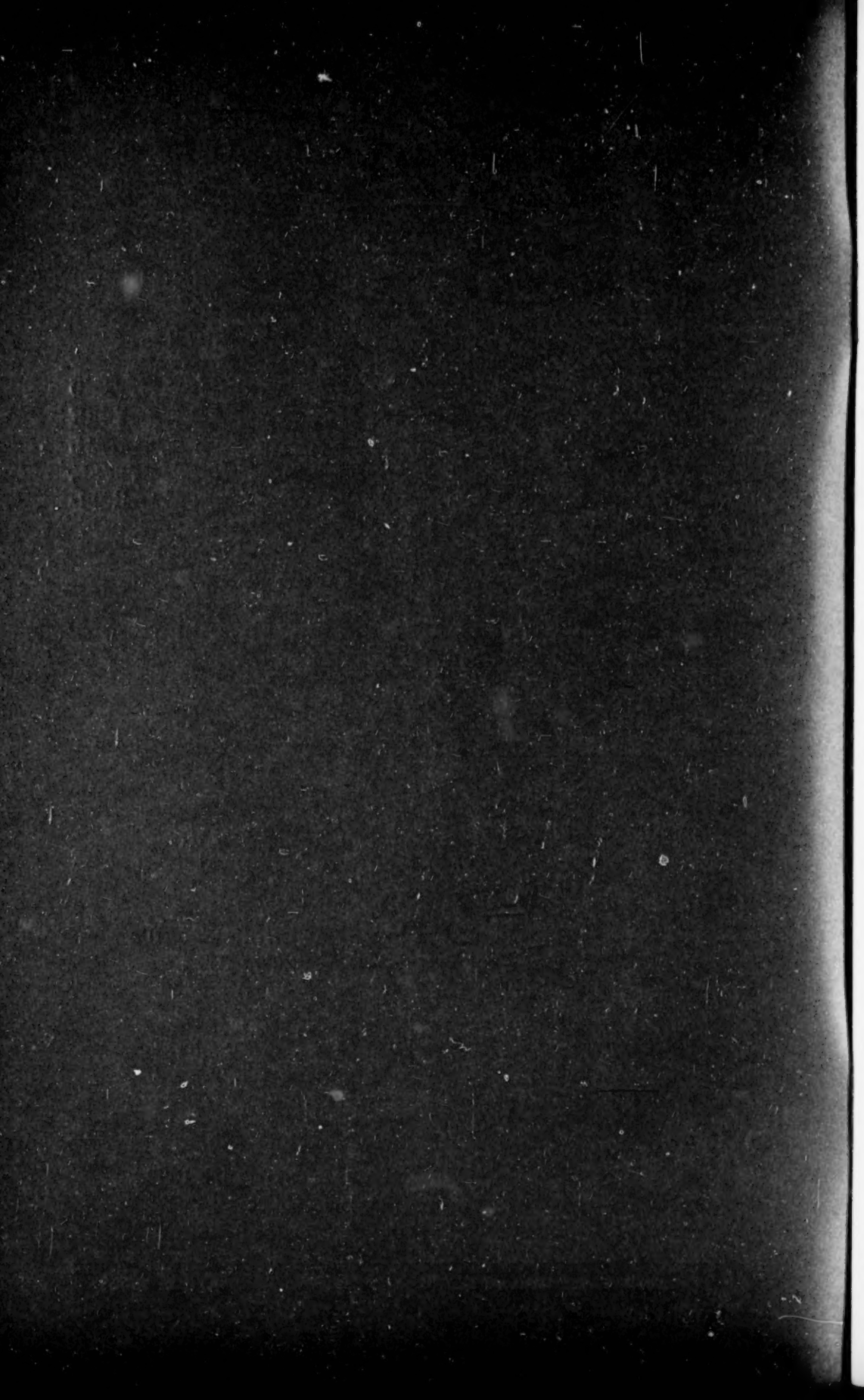
BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States District Court for the Northern District of New York and the United States Court of Appeals for the Second Circuit erred in ruling that the February, 1988 amendment to the New York State Teamsters Council Health and Hospital Fund Trust Agreement did not contravene LMRA Section 302(c)(5), 29 U.S.C. § 186(c)(5).

2. Whether LMRA Section 302(c)(5) and ERISA Section 404(a), 29 U.S.C. § 404(a) allow the February, 1988 amendment to be evaluated against an arbitrary and capricious standard, or require that the Defendant Trustees' action be subjected to strict scrutiny.

PARTIES IN THE COURT OF APPEALS

The parties before the district court and the Second Circuit Court of Appeals were International Brotherhood of Teamsters Joint Council 18 and Victor C. Olivadoti, President of Joint Council 18 and Employee Trustee (Petitioners in this Court), and the New York State Teamsters Council Health and Hospital Fund, the Trustees of the New York State Teamsters Council Health and Hospital Fund, James M. Carlton, Everett L. Campbell, James A. Hood, John Pryshlak, Nicholas Robilotto, and Ervin Walker (Respondents in this Court). Although Petitioners now refer to Joint Council 18 as the "New York State Teamsters Joint Council 18," its denomination in the courts below was "International Brotherhood of Teamsters Joint Council 18."

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v.

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STATE TEAMSTERS COUNCIL HEALTH AND HOSPITAL
FUND, JAMES M. CARLTON, EVERETT L. CAMPBELL,
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BRIEF IN OPPOSITION

Respondents New York State Teamsters Council Health
and Hospital Fund, the Trustees of the New York State
Teamsters Council Health and Hospital Fund, James M.
Carlton, Everett L. Campbell, James A. Hood, John
Pryshlak, Nicholas Robilotto, and Ervin Walker respect-

fully request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's opinion in this case. That opinion is reported at 903 F.2d 919.

STATEMENT OF THE CASE

This case arises from a dispute over an amendment to the New York State Teamsters Council Health and Hospital Fund ("the Fund"). The Fund is a welfare benefit trust fund governed by Section 302(c)(5) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186(c)(5), and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq. The Fund was founded in 1952 by the New York State Teamsters Council and by various contributing employers. It now provides benefits for employees who are members of eighteen local unions which are affiliated with three Joint Councils of the International Brotherhood of Teamsters (Joint Councils 17, 18, and 46). *Jt. App.* 35-36.¹

The Fund is governed by a written trust agreement. *App.* 1a-18a.² The Trust Agreement has been revised on numerous occasions and sets forth procedures for its amendment. *App.* 18a. Those procedures provide that the Trustees may amend the Trust Agreement "to any extent and at any time." *Id.*

The disputed amendment altered the appointment and removal procedures for Fund Trustees by placing appointment and removal authority in the participating joint councils and local unions. Prior to the February, 1988 amendment, the Agreement provided that Employee Trustees would be chosen by the "New York State Teamsters Council,"³ but that the entire Board of Trustees

¹ "Jt. App." indicates references to the Joint Appendix in the Court of Appeals proceedings below.

² "App." indicates references to the Appendix to this Brief in Opposition.

³ The "New York State Teamsters Council" no longer exists. Petitioners have maintained that IBT Joint Council 18 is the suc-

would designate which employer group would select the successor Employer Trustees.

For removal, the pre-amendment Agreement provided that Trustees could "only be removed from office for malfeasance or for any other reason specifically provided in the by-laws of the Board of Trustees." The Agreement also stated, with respect to removal, that a unanimous vote of the remaining trustees (Employer and Employee) was required. See App. 4a.

In 1986, the New York State Trucking Employers Association, Inc. and the Employer Trustees of the Fund sued the Union Trustees, challenging the Employee Trustees' involvement in the selection and removal of Employer Trustees. *New York State Trucking Employers Association, Inc. v. DePerno*, No. 86-CV-234 (N.D. N.Y.). On February 25, 1987, the parties entered into a Settlement Agreement, Jt. App. 165-70, under which they agreed that Trustees would not interfere with or become involved in the selection or removal of Trustees on the other slate. The court of appeals found that the amendment at issue here was adopted on February 24, 1988 to, among other things, conform the language of the Trust Agreement to the *DePerno* settlement. Pet. App. 8a⁴; Jt. App. 36-37.

For Employee Trustee appointment, the amendment specifies that successor Trustees will be selected by the current Employee Trustees from a list of nominees advanced by any one of the three participating Joint Councils. To qualify for nomination, a nominee must be

cessor to the "New York State Teamsters Council." Respondent does not accept that allegation but has conceded for purposes of the Motion for Summary Judgment that, prior to the 1988 amendment, Joint Council 18 had the exclusive authority to appoint and remove Employee Trustees. See App. Brief at 20 n.9 ("App. Brief" indicates references to Appellee's Brief in the Circuit Court below).

⁴ "Pet. App." indicates references to the Appendix to the Petition for a Writ of Certiorari, filed in this Court on August 15, 1990.

either an elected local union official or be specifically designated by a participating local union for Trustee service.

For Employer Trustee appointment, a similar process was established. The current Employer Trustees select successor Trustees from a list of nominees proposed by the contributing employers.

Under the amendment, neither slate of Trustees can participate in the selection of their counterparts on the other slate.

A parallel process was established for Trustee removal. Employee Trustees may be removed under the following conditions:

1. As required by law;
2. By a unanimous vote of the remaining Employee Trustees; or
3. By their local union affiliate.⁶

Employer Trustees may be removed:

1. As required by law;
2. By a unanimous vote of the remaining Employer Trustees; or
3. By a two-thirds vote of the contributing employers, or if removed by their affiliate employer.

See Pet. App. 23a-26a.

Petitioners commenced this action in January, 1989, seeking a declaratory judgment that the February, 1988 amendment constituted a "structural defect" to the Trust

⁶ To be eligible to serve as an Employee Trustee, the Trustee must be a local union officer or be designated for Trustee service by a local union. Local unions automatically remove Trustee representatives by voting them out of office or by revoking their Trustee service designation. See Pet. App. 23a-26a.

Agreement under LMRA Section 302(c)(5). The Complaint also sought a declaration that the Defendant Trustees' adoption of the amendment violated their fiduciary responsibility under ERISA Section 404(a)(1)(B).

Respondent Fund and Trustees Carlton, Campbell, Hood, Pryshlak, Robilotto and Walker filed an answer and counterclaim in due course. The counterclaim sought a declaration of the legality of the amendment and also requested reasonable attorney's fees and costs. Jt. App. 11.

Respondents filed a Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment. Jt. App. 25 *et seq.* The District Court granted that motion on May 31, 1989, and executed an Order so stating on that date. Pet. App. 16a. The court denied the request for reasonable attorneys' fees and costs. Pet. App. 14a, 16a.

Petitioners appealed the District Court's decision and Respondents cross appealed the denial of fees and costs. The United States Court of Appeals for the Second Circuit affirmed the conclusions of the district court, ruling that the February, 1988 amendment did not contravene LMRA Section 302(c)(5) in any respect. The Circuit Court also concluded that, under ERISA, the Trustees' conduct should not be disturbed absent a showing of bad faith or arbitrariness. The Court of Appeals remanded the fee issue to the district court for further consideration.⁹ Pet. App. 2a-10a.

⁹ The attorney fee question is pending before the district court at this time. However, briefing was delayed when Petitioner sought review in this Court.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT IN THE CIRCUITS AS TO THE APPROPRIATE STANDARD FOR REVIEW OF TRUSTEE ACTIONS.

Federal courts have often addressed the appropriate standard for reviewing Trustee administration of LMRA trust funds. In recognition of the common law of trusts, courts have uniformly provided Trustees a range of discretion to administer such funds, subject to express terms of the trust document and the requirements of law. Where the trustees are given plenary authority by the trust agreement, their decisions should be overturned only if they are arbitrary and capricious. See *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. 948, 953-54 (1989) ("Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers."). Indeed, the LMRA's regulation of employee benefit funds is the source of the application of a deferential standard of review to trustee administration of those funds. *Id.* at 953.

Petitioners seek to establish a conflict between the circuits as to the governing standard for court review of trustee action. Specifically, they argue that *Associated Contractors v. Laborers International Union*, 559 F.2d 222 (3d Cir. 1977) requires "strict scrutiny" of any Trustee action which affects appointment and removal procedures for trustees, contrary to the circuit court below, which ruled that an "arbitrariness or bad faith" standard is appropriate, relying on *Miles v. New York State Teamsters Conference Pension & Retirement Fund*, 698 F.2d 593, 599 (2d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983). See Pet. 15-17.⁷ Thus, Petitioners argue,

⁷ "Pet." indicates references to the Petition for a Writ of Certiorari filed in this matter on August 15, 1990.

the decision below has created a conflict in the circuits which public policy requires this Court to resolve.⁸

There is no such conflict. The United States Court of Appeals for the Third Circuit, *subsequent* to *Associated Contractors*, has made clear that an arbitrary and capricious standard of review for trustee conduct is appropriate in cases where trustee action has allegedly created a structural defect in the plan under LMRA Section 302(c)(5). *Adams v. New Jersey Brewery Employees Pension Trust Fund*, 670 F.2d 387, 397-98 (3d Cir. 1982); *Knauss v. Gorman*, 583 F.2d 82, 86-87 (3d Cir. 1978). Indeed, *Associated Contractors* does not address the appropriate standard for review of Trustee action and the term "strict scrutiny" does not appear in the *Associated Contractors* opinion. The court in *Associated Contractors* only notes that where the representation of Employers and Employees on a Fund is restructured by amendment, the amendment should be "carefully" scrutinized to assure that the resulting structure complies with the equal representation requirement. 559 F.2d at 227.

In this case, similarly, Petitioners alleged that the Trustees' amendment to the trust document created a structural defect under LMRA Section 302(c)(5) but the amendment at issue, unlike *Associated Contractors*, does not purport to "restructure" the representation of Employers and Employees on the Fund. The structure of the Board remained the same. By applying an arbi-

⁸ In *Associated Contractors*, the trustees of a Pension and Welfare Fund increased the size of the Board from six to eight trustees, and ceded to a rival association the right to appoint two of the four employer trustees. The court found that such a situation, where the two employer entities were avowed rivals and where Employee Trustees were importuned to support one of the rival groups, created an environment of intra-slate conflict which might upset the statutory "balance of power" (e.g., trustees representing one employer group might side with the Union to defeat the other employer group). 559 F.2d at 227-29.

bitrary and capricious standard to review the Trustees' action in this matter, the Second Circuit utilized the same standard of review as has the Third Circuit when reviewing other trustee conduct also alleged to have caused a structural defect in the Plan. In the process, the Second Circuit was faithful to *Associated Contractors* in "carefully" scrutinizing the resulting Trustee appointment/removal process to assure compliance with the intent of Section 302(c)(5). There is no conflict between these two circuits on the applicable standard of review.

In that regard, the Second Circuit is in accord with all other Circuits in applying the arbitrary and capricious standard of review to administrative actions affecting Section 302(c)(5) plans. *Stinson et al. v. Ironworkers District Council Benefit Trust*, 869 F.2d 1014, 1019 (7th Cir. 1989); *Deak et al. v. Masters, Mates and Pilots Pension Plan, et al.*, 821 F.2d 572, 576-77 (11th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988); *Varhola et al. v. Doe et al.*, 820 F.2d 809, 813 (6th Cir. 1987); *Central Tool Co. v. International Association of Machinists National Pension Fund*, 811 F.2d 651, 657-58 (D.C. Cir. 1987); *Niagara of Wisconsin Paper Corp. v. Paper Industry Union-Management Pension Fund*, 800 F.2d 742, 745 (8th Cir. 1986); *Johnson v. Franco et al.*, 727 F.2d 442, 447 (5th Cir. 1984); *Hurn v. Retirement Trust Fund of the Plumbing, Heating and Piping Industry*, 703 F.2d 386 (9th Cir. 1983).

Those cases which have applied heightened scrutiny to trustee conduct have done so only where trustees had clear conflicts between the interests of third parties outside the Plan and the interests of the Plan beneficiaries. See *Struble v. New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325, 333-34 (3d Cir. 1984); *Donovan v. Bierwith*, 680 F.2d 263, 271 (3d Cir. 1982), *cert. denied*, 459 U.S. 1069 (1982).⁹ In this matter, the

⁹ Even in this respect there is no conflict between the Circuits. Both the Second and Third Circuits take the same approach to cases posing a clear potential for conflict.

Second Circuit confronted no such conflict to trigger heightened scrutiny. There is no allegation that the revised appointment and removal process compromised the interests of the Fund beneficiaries. In fact, Petitioners only argue that the amendment makes Employee Trustees less accountable to Joint Council 18, which allegedly sponsored their appointment. Both the District Court and the Court of Appeals, reviewing the text of the amendment, flatly rejected Petitioners' claim and concluded, that, on the contrary, the Trustees are now more easily removed than prior to the amendment.¹⁰ Pet. App. 7a. There are no special circumstances in this case warranting a higher standard of review. Thus, the Court of Appeals properly reviewed the subject Trustee action under the arbitrary and capricious standard.

This Court's decision in *Firestone* does not require a higher standard for review of this type of Trustee action under ERISA. This Court's rejection of the "arbitrary and capricious" standard of review for trustee actions denying or granting benefits was based on the inapplicability of that trust law standard to ERISA's statutory remedy. 109 S.Ct. at 954. This Court therefore held that the arbitrary and capricious standard would apply only if Trustees were granted the necessary discretion by the Trust Agreement. *Id.* Article II, Section 1(m) of the Trust Agreement gives the Trustees plenary authority to construe the provisions of the Trust, and provides that any construction adopted by the Trustees will be binding upon the employers, employees, and the unions which

¹⁰ Petitioners allegation that the amendment was adopted to protect Trustee Robilotto has no admissible support in the record. More importantly, Petitioners overlook that Trustee Robilotto was appointed by Joint Council 18 and could have been removed by Joint Council 18 at any time prior to the amendment. The argument that the amendment was adopted to protect Robilotto from removal is untenable. Robilotto may now be removed by the remaining Employee Trustees, by the local union which designated him for service, or as required by law, if his prior legal difficulties (Pet. at 4) compromised his eligibility to serve.

are or shall be party to the Agreement. App. 9a. Furthermore, Article IV, Section 1 gives the Trustees the authority to amend the Trust Agreement "to any extent and at any time." App. 18a. Although this is not a benefits determination case under 29 U.S.C. § 1132(a)(1)(B), *Firestone's* guidance suggests that a deferential standard of review in this case is appropriate. 109 S.Ct. 953-54. See *Guy v. Southeastern Iron Workers' Welfare Fund*, 877 F.2d 37, 39 (11th Cir. 1989); *Boyd v. Trustees of United Mine Workers Health and Retirement Fund*, 873 F.2d 57, 59 (4th Cir. 1989); *Bali v. Blue Cross and Blue Shield Ass'n.*, 873 F.2d 1043, 1047 (7th Cir. 1989); *Lowry v. Bankers Life & Casualty Retirement Plan*, 871 F.2d 522, 524-25 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 152 (1989).

Moreover, the sole basis for Petitioners' allegation that adoption of the disputed amendment violated ERISA was that the amendment contravened LMRA Section 302(c)(5). The standard for review of trustee action under the LMRA is "arbitrary and capricious." 109 S.Ct. at 953. Since the ERISA claim here derives from an alleged LMRA violation, the arbitrary and capricious standard as established under the LMRA should apply.

II. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE MATTER.

This case presents a simple, straight-forward issue: does the February, 1988 amendment to the trust agreement contravene LMRA Section 302(c)(5) and ERISA Section 404(a)(1)(B). The court below evaluated the amendment against the dictates of the relevant statutes and properly concluded the amendment was permissible.

Petitioner's principal allegation throughout this litigation has been that the amendment removes Trustee accountability by insulating them from removal. See, e.g., Pet. at 13-15. The amendment does not have this effect. Prior to the amendment, Employee Trustees could be removed only by either the "New York State Team-

sters Council" or by a unanimous vote of the remaining Trustees (Employer and Employee) for undefined "malfeasance" or "for any other reason provided in the bylaws of the Board of Trustees." After the amendment, Employer Trustees are now removable either by a unanimous vote of the remaining Employee Trustees, by the local union with which they are affiliated, or as required by law. See Pet. App. 23a-25a. The amendment places no limits on the reasons for removal. The courts below properly concluded that Trustees are more easily removed now than prior to the amendment, and they are not insulated from accountability.

Petitioner's real complaint is not advanced on behalf of the Fund beneficiaries, but is motivated by political concerns: the February, 1988 amendment removed Joint Council 18's dominant control over the appointment and removal process for Employee Trustees, and the corresponding ability to control the Employee Trustees engendered by such unlimited power. There is no dispute that the amendment prevents Joint Council 18 from appointing or removing a Trustee on its own initiative. That authority now rests with all three participating joint councils, the local unions with whom the employee trustees are affiliated, and with their Co-Trustees. A Trustee that was appointed by Joint Council 18 is no longer removable solely by Joint Council 18, but he is removable by the local union of which he is an officer or official designate or by his Co-Trustees.

The simple fact that Joint Council 18 does not have exclusive and unfettered authority to remove trustees which it may have appointed does not violate LMRA Section 302(c)(5). No participating employer or union entity has the right to individually designate the trustees administering LMRA funds. Section 302(c)(5) requires only that the interests of employers and employees be equally represented in the administration of trust funds. 29 U.S.C. § 186(c)(5)(B); *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959). It does not require that

every participating entity have direct representation on the board of trustees of a benefit fund or that any participating union or any contributing employer have the right to control trustee appointment and removal. *Culinary and Service Employees Union Local 555 v. Hawaii Employee Benefit Administration, Inc.*, 688 F.2d 1228 (9th Cir. 1982); *Denver Metropolitan Association v. Journeymen Plumbers*, 586 F.2d 1367, 1374 (10th Cir. 1978); *Associated Contractors*, 559 F.2d at 227; *Independent Association of Mutuel Employees v. New York Racing Assoc., Inc.*, 398 F.2d 587, 590-91 (2d Cir. 1968); *New Bedford Fishermen's Welfare Fund v. S.I.U.*, 636 F. Supp. 412, 414-15 (D. Mass. 1986); *Modern Woodcrafts, Inc. v. Hawley*, 534 F. Supp. 1000, 1008 (D. Conn. 1982); *Mechanical Contractor Association v. Huico, Inc.*, 93 L.R.R.M. 2329, 2332 (W.D. Wash. 1976); *IBT Local 169 v. Teamsters Health & Welfare Fund*, 327 F. Supp. 260, 263 (E.D. Pa. 1971). The courts below followed this well-established line of authority in holding that Section 302(c)(5) does not accord Joint Council 18, as a participating employee entity, the inalienable right to trustee appointment and removal authority.¹¹

The disengagement from Joint Council 18 of exclusive control over trustee appointment and removal does not constitute illegal insulation from accountability. Nothing in the equal representation requirements of LMRA Section 302(c)(5) requires that trustees answer to the employee or employer entity which appointed them—the result sought by Petitioners throughout this litigation. As this Court made clear in *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322 (1981), a trustee's loyalty rests with the beneficiaries of the Fund, not with any particular appointing

¹¹ Petitioner's reliance on *Associated Contractors* is again ill-advised. *Associated Contractors* expressly recognizes that "not every party . . . to a welfare and pension fund has a right to select the fund's trustees." 559 F.2d at 227; *Modern Woodcrafts, Inc. v. Hawley*, 534 F. Supp. 1000, 1011-12 (D. Conn. 1982).

entity. By removing exclusive control over appointment and removal from Joint Council 18 and by placing it with the participating Joint Councils and local unions, the amendment allocated appointment and removal authority more broadly to those to whom this Court has determined the Trustee's true loyalty belongs.

The amendment offends neither trustee accountability nor equal representation, and the courts below properly found it permissible.¹²

III. THIS CASE IS NOT SUFFICIENTLY IMPORTANT TO WARRANT REVIEW.

This Court exercises its certiorari jurisdiction "only when there are special and important reasons" to do so. Sup. Ct. R. 10.1. Both the District Court and the Court of Appeals below readily found that the disputed amendment preserved trustee accountability, was properly adopted in accordance with the Trust Agreement which gives the Trustees the authority to amend the document "to any extent and at any time," Jt. App. at 58-59, and did not offend the statutory requirement of equal representation in any respect. The simple fact that there are many employee benefit plans in the United States, which contain large amounts of assets, does not make this dispute over the amendment to a single plan worthy of review in this Court.

The case presents no novel legal issue for examination by this Court, nor has Petitioner advanced any compelling public policy basis for granting certiorari in this matter. Rather, this is a case about a single amendment

¹² There is absolutely no support for Petitioners' suggestion that a "sponsoring labor organization" has the right to influence trustee appointment and removal, *vis a vis* other participating labor organizations. As already noted, however, there is well-established authority that no individual employee or employer entity can claim the individual right to appoint or remove trustees under LMRA Section 302(c)(5).

to a single trust agreement to ensure compliance with governing statutes, and a disgruntled union strongman's attempt to overturn it. This case therefore presents no "special and important" issues justifying Supreme Court review.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

TRUST AGREEMENT

**NEW YORK STATE TEAMSTERS COUNCIL
HEALTH AND HOSPITAL FUND**

Preamble

WHEREAS, a trust agreement was made and entered into on the 9th day of June 1952 by and between the New York State Teamsters Council, a voluntary unincorporated association, hereinafter referred to as the "Council" and various Employers in the State of New York who now are, then were, or will hereinafter become parties to collective bargaining agreements with the said Council or participating local Unions and who then had, now have, or will hereinafter agree to be bound by this Trust Agreement, hereinafter called "Employers", and

WHEREAS, the New York State Teamsters Council Fund was established pursuant to such original Trust Agreement of June 9th, 1952, and has continued in operation from that time to the present; and

WHEREAS, it appears advantageous to codify all previous changes and Amendments into one Instrument as amended; and

WHEREAS, the undersigned constitute the signatories to such original Trust Agreement and its Amendments from time to time, and all the remaining Trustees or their successors under the terms of such Trust Agreement, it is agreed in consideration of the premises and of the mutual promises and covenants made by each of the parties in the original agreement and hereto each to the other, as follows:

ARTICLE I

Organization

Section 1. There is hereby created and continued in existence the "NEW YORK STATE TEAMSTERS COUNCIL HEALTH AND HOSPITAL FUND".

Section 2. The purposes of said trust fund shall be to promote, develop and administer a program which shall provide for the payment under such rules of eligibility and in such amounts as the Board of Trustees shall, from time to time, determine in its discretion, of welfare benefits for the employees of contributing employers under the terms of a collective bargaining agreement or agreements between such contributing employers and the New York State Teamsters Council and/or local unions affiliated or participating with the said New York State Teamsters Council including death benefits, health and accident coverage, hospitalization, surgical benefits and proper medical and dental care. Any part or all of the above welfare benefits, with the exception of death benefits, may be extended to the dependents of such employees, under such rules of eligibility and in such amounts as the Board of Trustees shall, from time to time, determine in its discretion. Any local union may be considered as a contributing employer for its employees, and officers and business agents. Also considered as employers for their employees shall be the New York State Teamsters Council Health and Hospital Fund and the New York State Teamsters Conference Pension and Retirement Fund.

Section 3. The said trust fund shall be administered by a Board of Trustees, hereinafter designated as the "Trustees". There shall be equal representation of employees and employers in the administration of such Trust Fund. The trustees hereunder shall be eight (8) in number unless and until a different number shall be fixed by the Trustees as hereinafter provided, and thereafter shall be such number as shall be fixed from time to time by the Trustees; and the Trustees herein named shall continue to constitute the original Trustees hereunder.

Section 4. That, notwithstanding the said name and designation of "New York State Teamsters Council Health and Hospital Fund" title to the entire Trust Es-

tate or Fund and the absolute control thereof shall, at all times, be vested in the Trustees; and all obligations incurred, by, or in behalf of, the Trustees, shall be obligations of the trustees only, and not of the members of the Union or Unions nor of the International Union to which said Union or Unions is affiliated nor of the New York State Teamsters Council as such, but enforceable only against the Trustees, and then only to the extent of the Trust Estate in their hands and possession and never against them or any of them in their individual capacity or capacities; nor shall such obligations be considered obligations of the Employers either collectively or individually.

Section 5. The original trustees under this Amended Trust Agreement shall be Rocco F. DePerno, Fred Maggio, Nicholas Robilotto, and Donald Wells, who are representative of and chosen by the New York State Teamsters Council and Thomas R. Blando, Raymond Ryan, Gordon R. Tooley and Henry J. Tuffley, who are representatives of and chosen by the contributing Employers herein.

Section 6. The eight (8) Trustees names herein and who are at the present time holding office as such Trustees for four year terms respectively, are the following:

Donald Wells and William H. Mosley, Sr. to June 30th, 1977;

Rocco F. DePerno and Thomas R. Blando to June 30th, 1980;

Paul Gambacorto and David Quidort to June 30th, 1979; and

Johiah M. Wills and Nicholas Robilotto to June 30th, 1978

and they shall continue to hold office as Trustees to the end of such term. The term of office of each successor trustee shall be four (4) years. Successor trustees representing the employees shall be chosen in accordance

with the rules and regulations of the New York State Teamsters Council and shall automatically replace themselves at the end of their regular terms every four (4) years for a like term unless removed by the said New York State Teamsters Council. The Board of Trustees as a whole shall determine from time to time what employer group or groups shall elect successor employer trustees or fill vacancies in employer trustees, whether caused by death or otherwise. Such group or groups must, however, consist only of contributing employers to the Trust Fund, and no employer who is not a contributor to the said Trust Fund may vote for such employer trustees. The employer trustees shall automatically replace themselves at the end of their regular term every four (4) years unless removed by the employer group or groups designated by the Board of Trustees as provided herein.

Trustees can only be removed from office for malfeasance in office or for any other reason specifically provided in the by-laws of the Board of Trustees, and the Board as a whole is the sole judge of the qualifications of each Trustee. Title to all Trust property shall vest in such Trustees as joint tenants, and in the event of the removal or substitution of a Trustee, shall be transferred to the new Trustees appointed or designated in accordance with this provision, without any further act or conveyance. Notwithstanding this provision, it shall be the duty of each outgoing Trustee and of the heirs, executors or administrators of each deceased Trustee and of each continuing Trustee to execute, acknowledge and deliver such instruments or conveyance as shall be deemed by the Trustees advisable and appropriate for the purpose of confirming the title vested as aforesaid, in the Trustees then holding office.

Section 7. The Trustees established under this Trust Indenture shall serve as the named fiduciaries as required by the Employee Retirement Security Act of 1974 (hereinafter referred to as "ERISA"). The Trustees

shall have the authority to manage and control the administration and operation of the Fund and Plan.

Section 8. The principal office of the New York State Teamsters Council Health and Hospital Fund shall be located at such places as the Trustees shall designate from time to time.

ARTICLE II

Powers and Duties of the Board of Trustees

Section 1. That, until the termination of the Trust hereby created, the Trustees in the control and management of the Trust estate and in the conduct of the business of the Trust shall have power at any time, and from time to time, to invest and re-invest the Trust Estate at their absolute discretion, and without limiting the generality of the foregoing shall have power, at any time, and from time to time, to do the following:

(a) To subscribe for, invest in, and acquire such bonds, options, or other securities as the Trustees may, in their own uncontrolled discretion, determine, and to hold, sell, exchange, pledge, or otherwise dispose of such bonds, options, or other securities, which shall not be limited to those designated as "legals".

(b) To borrow money, without or with security, on such terms as the Trustees, in their uncontrolled discretion, may deem desirable, and to issue notes, bonds or other obligations therefore that may mature at a time beyond the possible termination of the Trust or any earlier time, and to enter into and make any indentures of trust or other agreements, covenants or arrangements for the benefit or security of such obligations.

(c) The Trustees shall have the power to demand, collect, receive and receipt for employer contributions or payments and other funds coming due as part of the Trust Estate, and may take such steps including the institution and prosecution of, or the intervention in any

proceeding at law, or in equity, or in bankruptcy, as may be necessary or desirable to effectuate the collection of such employer contributions or payments and other funds to which said Trustees shall be entitled. To consent to the extension of the time for payment or to the renewal of any bonds or other securities or obligations belonging to the Trust Estate, and to prosecute, defend, compound, compromise, abandon or adjust, by arbitration or otherwise, any actions, suits, proceedings, disputes, claims, demands, and things relating to the Trust Estate, and to transfer to any deposit with any corporation, committee, or other persons, any stocks, shares, bonds, or other securities forming part of the trust estate for the purpose of any arrangement for enforcing or protecting the interests of the trustees, and to pay any assessment levied in connection with such arrangement.

(d) To deposit any moneys included in or derived from the Trust Estate in such bank or banks as the Trustees may select for that purpose, to entrust to said bank or banks for safekeeping any of the funds, stock or share of certificates, bonds or other securities or obligations and any documents and papers comprised in, or relating to the Trust estate. The Resolution required to be executed for the purpose of opening said bank account shall provide for the signing of all checks in said account, by one Trustee representing the employees and one Trustee representing the employers.

(e) The Trustees shall also be empowered to appoint one or more banks or trust companies as Corporate Trustee or one or more investment managers (as defined in Section 3 (38) of ERISA), who shall be responsible for the management, acquisitions, disposition, investing and reinvesting of such of the assets of the Trust Fund as the Trustees may specify. If a corporate Trustee or investment manager has been appointed by the Trustees, no Trustee shall be liable for the acts or omissions of such Corporate Trustee or investment manager or be

under any obligation to invest or otherwise manage any asset of the Plan which is subject to the management of such Corporate Trustee or investment manager.

(f) To sell and convey as an entirety all of the property and assets of this Trust to a corporation or a new association or trust, organized for the purpose of acquiring the same, and organized for the same purposes and objects as in this Trust, provided that the consideration for such sale and conveyance shall be the assumption by such new corporation or association or trust of all liabilities and obligations of this Trust then outstanding, and the issuance and delivery by such new corporation or association or trust to this Trust, or upon its order, for distribution, as hereinafter provided, for all such shares as will enable this Trust to carry out its objects equitably and to obtain the greatest possible protection for the Union members employed by the participating employers.

(g) To provide for the payment of the welfare benefits to the members and their dependents under the plan of benefits provided directly by the check or draft of the Fund under self-insurance, or, if such self-insurance does not prove sound or feasible, to enter into contracts for the purchase of insurance for any or all of the coverages provided for in the plan of benefits from an insurance or casualty company, to pay the premium for such insurance, to determine the type and amount of insurance and to change such contracts and agreements from time to time; to enter into contracts for the purchase of hospitalization protection for the members of the Union and their dependents and to change the amounts of such protection from time to time; to enter into contracts with a doctor or doctors, and/or dentist or dentists, and/or optician or opticians, to provide medical, dental or optical care for the members of the Union and/or their dependents, and to change such contracts

from time to time; to pay the premiums and fees necessary to carry out such contracts and to maintain such insurance and other benefits in operation to such extent as the Trustees in their own discretion deem advisable, provided that these shall not be less than what is required under the labor contract or contracts hereinbefore mentioned.

(h) To make, adopt, amend or repeal such by-laws, rules and regulations not inconsistent with the terms of this Agreement and Declaration of Trust as they may deem necessary or desirable for the conduct of their business and the government of themselves, their officers, agents and other representatives.

(i) To determine, from time to time, whether and to what extent, and at what times and places, and under what conditions and regulations, the acts and books of the Trustees, or any of them, shall be open for inspection, except as required by law or government regulation, and no employer or members of the Union shall have the right to inspect any act or book or document of the Trustees except as authorized by resolution of the Trustees, or except in accordance with such conditions and regulations, if any, as may be prescribed at any time, by the Trustees or as required by law or government regulation; to issue such financial statements as they may deem proper and to determine at what time such statements shall issue, and the method of distribution unless otherwise required by law or government regulation. Provided, however, that the Trust Fund shall be audited annually by a Certified Public Accountant under the supervision of the Secretary-Treasurer of the Fund, and the result of such audit shall be available for inspection by any interested person at the principal office of the Trust Fund and at such other places as may be designated by the Trustees.

(j) To perform and do all such further acts and things as may be properly incidental to the exercise of the foregoing powers, or any agreement, to the same extent to which such further acts and things might be performed and done by a corporation lawfully organized and existing for the purposes and with the powers set forth in this Declaration.

(k) To appoint and designate a lawyer or lawyers to act as counsel to the New York State Teamsters Council Health and Hospital Fund in the handling of its legal affairs.

(l) The Trustees shall establish a funding policy and method consistent with the objectives of the Plan and the requirements of Part 3 Title I of ERISA. The Trustees shall meet annually at a stated time of the year to review the funding policy and method and the results shall be recorded in the minutes of the Trustees meeting.

(m) The Trustes shall have power to construe the provisions of This Declaration of Trust and the terms used herein. Any construction adopted by the Trustees in good faith shall be binding upon the employers, employers association or associations, the employee, the Council, the Union or Unions which are, or shall be parties to this Declaration of Trust.

Section 2. The regular meetings of the Trustees shall be held at Utica, New York, or such places, and at such times as the Trustees, by vote from time to time, may determine; and if so determined, no notice thereof need be given.

Section 3. Meetings other than regular meetings of the Trustees may be held at any time and at any place when called by four (4) or more Trustees. Notice of such meeting shall be given by the person designated by the Trustees or by the persons by whom such meeting is called, by giving to each of the Trustees three (3) day's notice of such meeting, sent by mail, postage pre-

paid or by telegram to the Trustees' usual address. It shall not be necessary to give notice of any meeting, as aforesaid, to any Trustee who is present at such meeting, or who, either before or after the meeting, waives such notice either orally or in writing.

Section 4. That in order to constitute a quorum for the transaction of any business, there must be present three (3) Trustees representing the contributing employers and three (3) Trustees representing the New York State Teamsters Council at any meeting or adjourned meeting.

Section 5. When a quorum is present, as above defined, a unanimous vote of the remaining Trustee shall be necessary for the removal of a Trustee as provided in Article I, Section 6 of this Trust Agreement. On all other questions, no proposition, resolution or motion shall be considered carried unless an affirmative vote is cast by two-thirds of the Trustees present at such meeting. In the event that two-thirds consist of a whole number and a fraction, then a two-thirds vote shall be deemed to consist of the next highest whole number.

Section 6. The Employer Trustees and the Council Trustees shall each elect by a majority vote, a Chairman. The Chairman so elected shall alternate monthly in serving as Chairman of the Board of Trustees.

Section 7.

(a) The Trustees shall be empowered to authorize any person or group of persons to serve in more than one fiduciary capacity (including service both as a Trustee and Administrator).

(b) The Trustees are empowered to authorize specifically by a resolution in writing the allocation of their collective responsibilities for the operation and administration of the Plan to one or more Committees of Trustees upon the condition that every committee have an equal number of Employer designated Trustees and

Union designated Trustees and that the resolution creating such committee specify its power and purposes. Where Trustees have allocated specific responsibilities, obligations or duties among Trustees, a Trustee to whom certain responsibilities, obligations or duties have not been allocated shall not be liable either individually or as a Trustee for any loss resulting to the Plan arising from the acts or omissions on the part of another Trustee to whom such responsibilities, obligations or duties have been allocated.

(c) The Trustees are empowered to authorize specifically by a resolution in writing the allocation of fiduciary responsibilities, other than Trustee responsibilities, among named fiduciaries and for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than Trustee responsibilities under the Plan). Where pursuant to the above procedure any fiduciary responsibilities of a named fiduciary is allocated to any other person, or persons designated to carry out such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent specified in Section 405 (c) (2) (A) and (B) of ERISA.

(d) Any provision of the Trust Indenture or the Plan which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation or duty as required by ERISA shall be void as against public policy.

Section 8. The Trustees shall designate an Administrator and/or Consultant to the Fund and such other employees as the Trustees may deem proper, and may permit any such employee or employees to resign, and may remove any such employee with or without cause, and without notice of any kind, and may fill any vacancy and may select temporary employees to serve at the pleasure of the Trustees. Such administrator and/or consultant and other employees shall be governed and

bound by all rules, regulations and provisions that may be established or adopted by the Trustees, and as may be changed from time to time. The said Board shall have power to determine the compensation of such administrator and/or consultant and other employees and for such purpose to enter into contracts of employment.

Section 9. That the Trustees shall jointly have custody of all moneys belonging to the Trust Estate and shall deposit and invest the same as aforesaid, and shall disburse the same in the discharge of obligations incurred by the Trustees for the purposes authorized by the Trustees, and for no other reason, by checks drawn by them against any deposit account or accounts and signed on behalf of the New York State Teamsters Council Health and Hospital Fund, as such Trustees, as hereinabove provided. The Trustees shall authorize a Trustee or an employee to keep accurate books of account of the financial transactions of the Trustees and shall require a bond for the faithful performance and discharge of the duties of such employee. Each Trustee and each employee of the Fund authorized or empowered to handle the funds or property of the Trust Estate, or to deposit or withdraw the same, or to sign or countersign checks drawn against said Trust Estate shall be bonded in an amount to be determined by the Board of Trustees from time to time for the faithful discharge of their duties. The premium on such bond or bonds shall be paid out of the Trust Estate, and such bond or bonds, if given, shall be in the custody of the Trustees or their attorneys.

Section 10. That in this Declaration of Trust nothing shall be deemed or construed to constitute the Trustees and/or the members of the Union and/or the employers paying into the Trust, as aforesaid partners; and it is further expressly declared that a trust and not a partnership is hereby created by this Declaration of Trust. It shall be the duty of the Trustees, and each of them to include in every written agreement entered into by them, or any of them as herein provided, and of every

officer or agent elected or appointed by the Trustees to include in every written agreement entered into, a statement of immunity provided by this Declaration for the Trustees, officers, agents and other representatives of this Trust as individuals; and neither the Trustees nor any officer, agent or representative appointed or elected by them shall have any power or authority to enter into any agreement or incur any obligation as herein provided which shall in any way bind any of the Trustees individually or the Union or the individual employers, but their power shall be limited to obligations and agreements binding upon the Trust Estate.

Section 11. Unless sooner terminated, the Trust hereby created shall continue indefinitely, provided, however, that pursuant to agreement between the New York State Teamsters Council and seventy-five (75) percent of the contributing employers jointly, upon six (6) months' notice to terminate the fund, the Trust hereinabove set forth shall be deemed terminated at the expiration of such period, and all funds, securities, goods, valuables and property in the possession of the Trustees and held or owned by them under this Declaration shall be liquidated and the proceeds used until exhausted to provide benefits under the welfare plan. In the event of such termination, it shall be the duty and obligation of the Trustees, and each of them, and of their heirs, executors, assigns and legal representatives, to execute such documents, deeds, assignments or other indicia of title as may be necessary and proper to effectuate this transfer and termination.

Section 12.

(a) The Trustees and each individual Trustee shall not be liable for any error of judgment or for any loss arising out of any act or omission in the execution of the Trust unless they have failed to exercise the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct

of an enterprise of a like character and with like aims, nor shall any Trustee be personally liable for the acts or omissions (whether performed at the request of the Trustees or not) of any other Trustee, or of any agent or person or entity elected or appointed by or acting on behalf of the Trustees unless he participates knowingly in, or knowingly undertakes to conceal an act or omission of such agent or person or entity, knowing such act or omission is a breach of fiduciary responsibility, or he has enabled such agent or person or entity to commit a breach of fiduciary responsibility by his failure to comply with his own specific responsibilities, or he has knowledge of a breach of fiduciary responsibility by such agent, or person, or entity and has not made reasonable efforts under the circumstances to remedy such breach.

(b) The Trustees may purchase out of Fund assets insurance for the Trustees or the Fund to cover liability or losses occurring by reason of the act or omission of the Trustees if such insurance permits recourse by the insurer against the Trustees in the case of a breach of a fiduciary obligation by the Trustees. The Employers and the Union may purchase insurance to cover the potential liability of their designated Trustees. A Trustee may also purchase insurance for himself to cover liability or loss occurring by reason of the act or omission of said Trustee or by reason of the breach of their fiduciary responsibility.

In the event that in any action against the Trustees individually or collectively an attachment, lien or other encumbrance of any kind is or may be placed or taken against the personal estate or property of any trustee or trustees, the cost of any bond or surety necessary to protect or release the personal property of the trustee or trustees, until such time as a final judgment be entered against such trustee or trustees shall be borne by the fund.

Section 13. The death of any Trustee shall not operate to terminate the Trust nor shall the legal representative

of such Trustee be entitled to any accounting or to take any action in the courts or otherwise, but the election of such Trustee shall be deemed purely personal and not a right that can descend to heirs at law or legal representatives.

Section 14. In the event that the employer trustees and the employee trustees deadlock on the administration of the Trust Fund created by this Trust Agreement, the matter in dispute shall be submitted to an impartial Chairman for final determination, and his decision in regard to the matter in dispute shall be binding upon all of the Trustees and deemed to be their act and decision. The decision of such Impartial Chairman shall be in writing and shall be enforceable as an arbitration award in any court of competent jurisdiction. However, neither the Trustees nor the impartial Chairman shall have the power in any way whatsoever to alter, diminish or add to the basic provisions regarding said Trust Fund, its management and its use. The cost and expense of maintaining the office of impartial Chairman, in connection with the administration and management of the said Fund shall be borne by the Fund.

Section 15. In the event that the Trustees are unable within thirty (30) days after a disagreement to agree upon an impartial Chairman as provided in section 14 above, a majority of the Union Trustees or a majority of the employer Trustees may petition the District Court of the United States for the district where the Trust Fund has its principal office, to appoint an impartial Umpire. The decision of such impartial Umpire shall be final and binding.

Section 16. No employee, nor any person claiming by, through or under any employee, nor any employer (except as to an overpayment of contributions) shall have any right, title or interest in or to the Trust Estate or any part thereof; provided, however, that any employee who shall be actually covered by an insurance

plan, or his beneficiaries under such plan, shall be entitled to the benefits in the forms and amounts and subject to the terms and conditions of such plan and of this Trust. No employee shall have the option to receive any part of the employer contribution instead of the benefits of such plan or of this Trust. No employee shall have the right to assign his right and benefits under such plan or of this Trust or to receive a cash consideration in lieu of such benefits either upon the termination of the Trust or his withdrawal through severance of employment or otherwise.

Section 17. The Trustees may receive compensation for the performance of their duties as Trustees to the extent permitted by law and in such amounts as the Board of Trustees may determine including reimbursements of all reasonable and necessary expenses which they incur in the performance of their duties as Trustees. The cost and expense of any suit or proceeding brought against the Trustees or any of them (including counsel fee) shall be paid from the Trust Estate.

If any Trustee shall be called upon to travel or perform extra services he shall be paid his expenses and such special remuneration as the Trustees reasonably may determine. No Trustee shall be obliged to give any bond or surety or other security for the performance of any of his duties hereunder except as provided in section 9 of this Article.

ARTICLE III

Miscellaneous

Section 1. The Trustees shall require that the signing of checks, drafts, vouchers or other withdrawals of funds from the account or accounts of the Trust Estate as they may deem necessary or advisable for the proper administration of the Trust be made by any two Trustees so designated by the Board of Trustees provided one is a

Union designate Trustee and the other an Employer designated Trustee.

Section 2. The Trustees shall have the power to require any employer, and any employer when so required, shall furnish to the Trustees, such information and reports as they may require in the performance of their duties under this Agreement and Declaration of Trust. The Trustees, or any authorized agent or representative of the Trustees, shall have the right at all reasonable times during business hours to enter upon the premises of employers and to examine and copy such of the books, records, papers and reports of said employers as may be necessary to permit the Trustees to determine whether said employers are making full reports and payments to the Trustees of the amounts required by the aforementioned collective bargaining agreement.

Section 3. Should any provisions of this Trust be deemed or held to be unlawful or unlawful as to any person or instance, such fact shall not adversely affect the other provisions herein contained or the application of said provisions to any other person or instance, unless such illegality shall make impossible or impractical the functioning of the ultimate plan. No Trustee shall be held liable for any act done or performed in pursuance of any provision herein (regardless of the fact that such provision or act may be held unlawful) prior to the time when such provision or act shall in fact be held to be unlawful by a court of competent jurisdiction.

Section 4. Should any provisions of the aforementioned collective bargaining agreement between the New York State Teamsters Council and/or its affiliated local unions and the New York State Employers Association, Inc. and/or its members or any individual employer contributing to this Fund be declared to be in violation of the Labor-Management Relations Act of 1947, as amended (commonly called the "Taft-Hartley Act") or any other State or Federal statute or regulation, such

declaration shall in no way impair the effectiveness or continuity of the provisions of such contract or contracts or of this Declaration of Trust which establish the Health and Hospital Fund and provide for the payment of contributions by the employers to such Fund, and such provisions are hereby declared to be saved from such illegality.

Section 5. The Trustees, by joining in the execution of this Agreement hereby accept the Trust.

ARTICLE IV

Amendment

Section 1. This Agreement and Declaration of Trust may be amended to any extent and at any time and from time to time or revoked, at a regular or special meeting of the Trustees called for that purpose by the concurring vote of at least two-thirds of the Trustees provided, however, that no amendment or revocation shall provide for the use of the Trust Estate then in the hands of the Trustees for any purposes other than that set forth in Article I, Section 2 of this Trust Agreement or permit any return or payment over of any part of the then existing Trust Estate to any employers, except the return of an overpayment of contributions due, or so amend this Trust Agreement that there shall not be an equal number of employer Trustees and of Union Trustees to administer this Trust.

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